Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1370

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMY AUSTIN, A MINOR, et al.,

Petitioners

v.

BROWN LOCAL SCHOOL DISTRICT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether in an action involving the appropriateness of the education provided to a handicapped child, a plaintiff may proceed under the Civil Rights Act of 1871 as amended (42 U.S.C. §1983) for alleged violations of the Rehabilitation Act of 1973 (29 U.S.C. §794) and constitutional provisions as well as under the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 *et seq.*) when no independent due process claim has been presented to the District Court.

2. Whether in an action involving an alleged denial of a free appropriate public education, the remedial provisions of the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 *et seq.*) are exclusive and a claim under the Rehabilitation Act of 1973 (29 U.S.C. §794) is not available.

LIST OF ALL PARTIES

Petitioners:	Amy Austin, a minor Harold Austin Linda Austin
Respondents:	Brown Local School District State of Ohio Board of Education State of Ohio Department of Education Franklin B. Walter (Superintendent of Public Instruction) Bruce Schmidt (Superintendent Brown Local School District) Canton City School District

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OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit is now reported at 746 F. 2d 1161. The Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on October 25, 1984. On February 6, 1985, Justice O'Connor signed an order extending the time in which to file a petition for a writ of certiorari to and including February 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

IMPARTIAL DUE PROCESS HEARING:

Amy Austin was thirteen (13) years old when this action was begun, and she had been diagnosed as being autistic or "autistic-like." Her public school education began in approximately January of 1975 when she was enrolled in the University School in Kent, Ohio, which was a special education program for "autistic-like" children operated by the Kent City School District.

In July of 1975, the Petitioners moved to a farm located in the Brown Local School District in Carroll County, Ohio, which was more than a one (1) hour drive from Kent. However, Amy continued to attend the University School, and the Brown Local School District paid for Amy's transportation to Kent. At the beginning of the 1976-1977 school year, Amy was enrolled in a new program for educable mentally retarded children which had been established by the Brown Local School District at the Malvern School. This new placement was located closer to Amy's home, and it was made because Amy's parents had indicated to Bruce Schmidt (then the Superintendent of the Brown Local School District) that they did not like Amy being so far from home, and that they were unhappy with the Kent program. Amy remained in the program at Malvern School through the 1978-1979 school year.

By 1979, however, the Petitioners had become dissatisfied with Amy's progress at Malvern School, and in June of 1979, a meeting was held between Amy's parents and Malvern School officials to discuss Amy's educational placement. At the conclusion of this meeting, it was decided that the Petitioners would investigate the availability of other possible programs for Amy. Subsequently, in September of 1979, for the 1979-80 school year, Amy was placed in the Lathrop School operated by the Canton City School District after Petitioners had observed and approved the placement. The Brown Local School District, as the school district of residence, paid the expenses incurred from this placement.

At some point during the 1980-81 school year, the Petitioners became dissatisfied with the Lathrop program. This dissatisfaction apparently stemmed from certain disagreements between the Petitioners and Lathrop School officials on the question of discipline as it related to Amy's individualized educational plan. The Petitioners did not, however, advise officials of the Brown Local School District of their concerns.

On November 17, 1980, the Petitioners requested an impartial due process hearing pursuant to Ohio Revised Code §3323.05(E) and 20 U.S.C. §1415(c) for the purpose of reviewing the appropriateness of Amy's individualized educational program. The Petitioners continued to be dissatisfied with the Lathrop School program, and on January 9, 1981, they voluntarily withdrew Amy from the program. For several weeks thereafter and during the pendency of the impartial due process proceedings, the Brown Local School District provided home tutoring for Amy.

On March 17, 1981, an impartial due process hearing was held, and the Petitioners and school officials presented testimony, psychological test results and evaluations, and other evidence relating to the appropriateness of Amy's educational placement in the Lathrop School program. On April 24, 1981, the Impartial Hearing Officer issued his decision finding that Amy was, in fact, being provided a free appropriate public education by the Brown Local School District.

The Petitioners elected to appeal the findings and decision of the Impartial Hearing Officer to the Ohio State Board of Education in accordance with Ohio Revised Code §3323.05(F). Pursuant to the state statute, the appeal was referred to a Referee for a report and recommendation. On October 13, 1981, the Referee issued his Report which recommended that the State Board of Education find that Amy was not being provided with a free appropriate public education by the Brown Local School District. Thereafter,

on November 9, 1981, the Ohio State Board of Education reviewed and rejected the Referee's recommendation and, in essence, affirmed the decision of the Impartial Hearing Officer and found that Amy was being provided a free appropriate public education in accordance with federal and state law.

UNITED STATES DISTRICT COURT PROCEEDING:

Pursuant to the provisions of 20 U.S.C. §1415(e)(2), a complaint was filed on behalf of the Petitioners in the United States District Court for the Northern District of Ohio, Eastern Division, on December 2, 1981. The complaint sought judicial review of the state administrative proceedings conducted pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §1401 *et seq.;* Ohio Revised Code §3323.01 *et seq.;* and the regulations promulgated thereunder. In addition, the Petitioners, in their complaint, claimed a right to relief predicated upon §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the due proces and equal protection clauses of the Fourteenth Amendment to the United States Constitution enforceable through 42 U.S.C. §1983 for the alleged failure to provide a free appropriate public education.

However, it was the position of the Respondents that only the provisions of the EAHCA offered a proper basis for the claims being advanced by the Petitioners. Accordingly, after discovery, all of the Respondents joined in filing a motion for partial summary judgment in their favor with respect to those claims brought pursuant to 42 U.S.C. §1983, §504 of the Rehabilitation Act, and all other claims not brought pursuant to the EAHCA. On April 26, 1983, the District Court issued an unpublished opinion and order which granted the Respondents' motion for partial summary judgment. Thereafter, on the day of trial, the Petitioners moved the District Court for permission to voluntarily

dismiss their remaining claim under the EAHCA, and this motion was granted by the Court.

UNITED STATES COURT OF APPEALS PROCEEDINGS:

A notice of appeal from the decision of the District Court was filed in the United States Court of Appeals for the Sixth Circuit on behalf of the Petitioners on May 23, 1983. The Court of Appeals issued its decision on October 25, 1984, which affirmed the judgment of the District Court in all respects based upon the authority of the intervening decision of this Court in *Smith v. Robinson*, 468 U.S. ____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984).

SUMMARY OF ARGUMENT

In *Smith v. Robinson*, 468 U.S. _____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), this Court recently held that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.*, provides the exclusive avenue through which a handicapped child and his parents or guardian may protect the constitutional right of the handicapped child to a free appropriate public education in the absence of any independently alleged due process violation. In the case *sub judice*, the Court of Appeals correctly determined that the Petitioners' claims under 42 U.S.C. §1983 and §504 of the Rehabilitation Act of 1973 were precluded by the standards announced by this Court in *Smith*. Accordingly, both the decision of the Court of Appeals in the case *sub judice* and this Court's decision in *Smith* should be left undisturbed.

ARGUMENT

The Petitioners contend on page ten (10) of their Petition for Writ of Certiorari that they are seeking a clarification of this Court's position "in a situation where severe injury has resulted from failure to provide a handicapped child with a free appropriate education and where the remedy provided for by the EAHCA is not adequate." The Petitioners, then, go on to refer in several places in their Petition to certain unspecified "injuries" allegedly suffered by Amy Austin as a result of the alleged failure of the Respondents to provide her with a free appropriate public education and for which the EAHCA does not provide an adequate remedy. The Respondents respectfully submit that the representations made by the Petitioners respecting Amy's alleged injuries, such as the reference to the regression of her learning and interpersonal skills appearing on page eleven (11) of the Petition, are simply not supported by the record in this case. In addition, both the District Court and the Court of Appeals concluded that the EAHCA does, within the context of this case, provide the appropriate avenue through which the Petitioners may seek an adequate remedy for their claims. The Court of Appeals, in an opinion by Chief Judge Lively, stated:

> The plaintiffs [Petitioners] argued three issues in their briefs in this court. They contended that money damages are recoverable under §504 of the Rehabilitation Act of 1973 for failure to provide a free appropriate public education as required by EAHCA, that damages are recoverable under §1983 for the Fourteenth Amendment equal protection violation for failure to provide the EAHCA-required education and that damages are recoverable under §1983 for a Fourteenth Amendment due process violation for failure to provide the EAHCA-mandated education or for "mistreatment" involved in providing an "inappropriate"

education.

> Success on two of these claims is foreclosed by intervening Supreme Court decisions which support the result reached by the district court.
>
> 746 F. 2d at 1163-1164

The Respondents, like the Court of Appeals, believe that the issues raised in the case *sub judice* were decided and are controlled by the recent decision of this Court in *Smith v. Robinson*, 468 U.S. _____, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984). Additionally, the Respondents respectfully submit that no further clarification of that decision is necessary.

In *Smith*, this Court considered a claim for attorney fees in a case, identical to the case *sub judice*, where the plaintiffs combined claims under 42 U.S.C. §1983 with claims under the EAHCA and under §504 of the Rehabilitation Act, and this Court concluded that a handicapped child and his parents could not rely on both the EAHCA and §504 of the Rehabilitation Act in an action for an alleged failure to provide the child with a free appropriate public education. This Court, in an opinion authored by Mr. Justice Blackmun, stated:

> We note the uncertainty regarding the reach of §504 to emphasize that it is only in the EHA that Congress specified the rights and remedies available to a handicapped child seeking access to public education. Even assuming that the reach of §504 is coextensive with that of the EHA, there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of §504.
>
> 468 U.S. at _____, 104 S. Ct. at 3473

Further, in *Irving Independent School District v. Tatro*, 468 U.S. _____, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984), decided the same day as *Smith*, this Court observed that "§504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services." 468 U.S. at _____, 104 S. Ct. at 3379. Therefore, the Respondents respectfully submit that the Court of Appeals was correct in concluding in the case *sub judice* that the Petitioners' claims under §504 of the Rehabilitation Act were precluded by this Court's teachings in the *Smith* case.

Likewise, the Court of Appeals was correct in holding that the Petitioners' equal protection claim under 42 U.S.C. §1983 was also foreclosed by this Court's holding in *Smith*. Mr. Justice Blackmun wrote:

> In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result. Rather, it indicates that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.
>
> 468 U.S. at _____, 104 S. Ct. at 3470

Finally, the Court of Appeals was correct in holding that the District Court had properly dismissed the Petitioners' claims under 42 U.S.C. §1983 based upon alleged violations of due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. The

Petitioners contend that their due process claims are separate from their other claims and were presented as independent constitutional claims, and they rely upon the following language used by Mr. Justice Blackmun in a footnote:

> On the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme.

468 U.S. at _____, 104 S. Ct. at 3470-3471, n. 17

However, the Respondents assert, and the Court of Appeals agreed, that the due process claims were interwoven with the EAHCA claims and, therefore, were not presented as an independent challenge. 746 F. 2d at 1166. The Court of Appeal's analysis, though lengthy, is set forth here as follows:

> While the plaintiffs argue forcefully on appeal that they presented an independent due process claim in this lawsuit, this was never made clear in the district court. Several facts render their present position suspect and support the defendants' arguments that the §1983 claims were "interwoven" with the EAHCA claims to support those claims.
>
> First, there is the fact that the teacher and principal who actually administered the discipline now complained of were never made parties defendant. On the other hand, the two school districts, a district superintendent and the State of Ohio Department of Education and the State Superintendent of Public Education were sued. These agencies and officials are responsible for administration of the EAHCA. Further, the final pretrial order stated that the plaintiffs contended that the behavior modification techniques were "inappropriate," a standard used in the EAHCA.

> Finally, the plaintiffs filed as exhibits to their memorandum in opposition to the defendants' motion for partial summary judgment affidavits of a specialist in the education of retarded children and a psychiatrist. The education specialist dealt with all four disciplinary actions under the heading, "ISSUES RELEVANT TO AN APPROPRIATE EDUCATION." The entire thrust of the affidavit is to the effect that the administration of the disciplinary measures complained of denied Amy an appropriate education. Similarly, the affidavit of the psychiatrist is concerned with the appropriateness of the program and environment of Lathrop School, not with a claim of infringement of Amy's liberty interests.
>
> 746 F. 2d. at 1166

Thus, the Court of Appeals was correct in concluding as follows:

> The §1983 claims, as pled and argued in the district court, did not identify an independent due process violation based on infringement of Amy's liberty interest. Rather, relying on *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), the plaintiffs argued that the defendants violated §1983 by failing to obey the commands of two federal statutes, the EAHCA and the Rehabilitation Act. The district court correctly held that the plaintiffs could not circumvent the procedural requirements of the two comprehensive statutes dealing with handicapped individuals by going directly into federal court under §1983 to obtain an adjudication that Amy had been denied the benefits of those statutes. This was one of the clear holdings of *Smith v. Robinson*.
>
> 746 F. 2d at 1166

Therefore, the Respondents respectfully submit that it is

readily apparent that the Court of Appeals has faithfully applied this Court's holdings in *Smith v. Robinson*, and the decision of the Court of Appeals in this case and the decision of this Court in *Smith* should be left undisturbed.

CONCLUSION

In light of the foregoing, the Respondents strongly urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondents in Opposition to Petition for Certiorari was served upon Sheldon Stein, Counsel of Record for Petitioners, 1226 Standard Building, P.O. Box 5606, Cleveland, Ohio 44101; Stanley Morganstern, Attorney for Petitioners, Suite 800, One Public Square, Cleveland, Ohio 44113; and Cesare Refe, Attorney for Petitioners, 1210 Standard Building, Cleveland, Ohio 44113, by placing same in the regular U.S. Mail service, postage pre-paid, this _____ day of March, 1985.

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